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Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1884

KENNETH J. CROUCHER, ROBERT BURKE, DUANE MORRISON and MICHAEL FRANCIS,
Petitioners,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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No.

KENNETH J. CROUCHER, ROBERT BURKE, DUANE MORRISON and MICHAEL FRANCIS,
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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioners, above listed, respectfully pray a Writ of Certiorari issue to review the Judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on January 12, 1976.

OPINION BELOW

The opinion of the Court of Appeals is reported in 525 F.2d 943 (5th Cir. 1976) and appears in the appendix hereto. A copy of the Judgment and the Order denying petition for a rehearing en banc, entered June 1, 1976 also appears in the appendix. Pursuant to Rule 21(2) of

the Supreme Court Rules, Petitioners are submitting the appendix printed and filed with the Fifth Circuit. Hereinafter this appendix will be referred to as the Record (R.).

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on January 12, 1976. A petition for a rehearing en banc was timely filed and an Order, denying the petition for a rehearing en banc, was entered on June 1, 1976. This Petition for Certiorari was timely filed within thirty (30) days of that date. This Court's jurisdiction is invoked under Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED

I.

WHETHER THE DOUBLE JEOPARDY CLAUSE REQUIRES CONSPIRACY AGREEMENTS TO BE DISTINGUISHABLE BEYOND THE DIVERSITY OF THEIR OBJECTS BEFORE CUMULATIVE PUNISHMENT ON MULTIPLE COUNTS MAY BE IMPOSED.

II.

WHETHER CUMULATIVE PUNISHMENT WAS INTENDED FOR A SIMULTANEOUS AND IDENTICAL CONSPIRACY TO IMPORT AND POSSESS MARIJUANA BY THE

PASSAGE OF THE CONTROLLED SUBSTANCES ACT OF 1970.

III.

WHETHER A DOUBLE STATE-FEDERAL PROSECUTION FOR THE SAME OFFENSE VIOLATES THE DOUBLE JEOPARDY CLAUSE.

IV.

WHETHER THE VIOLATION OF THE "PETITE" POLICY AGAINST STATE-FEDERAL DOUBLE PROSECUTION OFFENDS DUE PROCESS REQUIREMENTS.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The following portion of the Fifth Amendment of the Constitution of the United States:

> ". . . nor shall any person be subject to the same offense to be twice put in double jeopardy of life or limb; . . . nor be deprived of life, liberty, or property, without due process of law . . . .".

The following portions of the Controlled Substances Act of 1970:

Title 21 USC Sec. 846

> Any person who attempts or conspires to commit any offense defined in this subchapter (in-

volving possession of controlled substances) is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Title 21 USC Sec. 847

Any penalty imposed for violation of this subchapter (involving possession of controlled substances) shall be in addition to and not in lieu of, any civil or administrative penalty or sanction authorized by law.

Title 21 USC Sec. 963

Any person who attempts or conspires to commit any offense defined in this subchapter (involving importation) is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Title 21 USC Sec. 964

Any penalty imposed for violation of this subchapter (involving importation) shall be in addition to, and not in lieu of, any civil or administrative penalty or sanction authorized by law.

Title 28 USC Sec. 2106

> The Supreme Court or any other Court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of the Court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

The following portion of the Department of Justice policy, United States Attorneys Manual, tit. 2 at 5 (1970). See 1 Working Papers of the National Commission on Reform of Federal Criminal Laws 346-347 (1970):

> It is Department policy that after a State prosecution there should be no federal trial for the same act or acts unless there are compelling federal interests involved, in which case prior authorization should be obtained from the appropriate Assistant Attorney General having jurisdiction over the subject matter of the case. (Better known as the "Petite" policy)

STATEMENT OF FACTS

Agents of the State of New Mexico had applied and received from a State Court an authorization to intercept telephone communications from some of the Defendants in this case. Two of the intercepted telephone calls indicated that the conspirators had

arranged an importation of marijuana. A surveillance almost immediately followed in which the Defendants were observed in bringing marijuana by plane from Mexico into the State of New Mexico, at which point all of the Defendants were arrested and the marijuana seized.

After their arrest, Defendants entered pleas of nolo contendere to the state charges, and each was assessed an eighteen month probated sentence and fined $1,-000.00 by the New Mexico State Court.[1]

Meanwhile the prosecution in the Western District of Texas was rethinking its case and preparing a "second shot" by seeking information to untaint the poison fruit which was a complete failure, (R. p. 964-966) and by contriving venue in a jurisdiction where rougher treatment could be expected. This motive was made obvious by the Grand Jury minutes (R.p.948) and the sentiments of the agents during the trial. (R.p.288).

Then nearly six months after the entry of the negotiated plea in New Mexico, sealed indictments were returned in the Western District of Texas without "prior authorization" from the "appropriate Assistant Attorney General having jurisdiction over the subject matter of the case" as required by Attorney General policy. (excerpt above)

A two count indictment was brought and the trial

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1 A later decision of the Supreme Court requiring the signature of the Attorney General on a wiretap application confirmed the shrewdness of the New Mexico prosecutor's decision to negotiate a plea. *U.S. v. Giordano*, 416 U.S. 505, 40 L.Ed.2d 341, 92 S.Ct. 468 (1974).

Court sentenced the Defendants to maximum sentences of 5 years each, to run consecutively, for violation of 21 USC 846 (conspiracy to possess) and 21 USC 963 (conspiracy to import). No claim was made at trial or before the Appellate Court that these two counts arose from other than a single and identical agreement.

The Fifth Circuit in the opinion below reversed as to the two "ring leaders" thereby finding that the evidence seized was tainted by the illegal wiretap but affirmed as to the remaining four present Defendants concluding that they had no standing to object. The Court below also affirmed the consecutive sentencing for what has not been disputed to be a single and identical conspiratorial agreement. From this cumulation of punishment and dual state-federal prosecution the Defendants herein presently seek a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

(1) A Clear 2-2 Division Exists Between The Circuits As To The Legality Of Cumulative Sentences Which Have Substantially And Unequally Penalized The Defendants In Two Circuits.

(a). Circuit Division

The opinion below clearly certifies the present circuit division as follows:

> The Appellants argue that their protections against double jeopardy were violated by the

> imposition of consecutive sentences for the offenses of conspiring to possess (21 USC 846) and conspiring to import marijuana (21 USC 963) . . . They assert that there was only one conspiratorial agreement, and that, therefore, no matter how many illegal objects existed, there was only one conspiracy. Three circuits have decided this issue. Two have held that multiple prosecutions are not sustainable under the above two conspiracy provisions. *United States v. Honneus*, (1st Cir. 1974) 508 F.2d 566 (Not sustainable,) cert. denied, 421 U.S. 948, 44 L.Ed.2d 101, 95 S.Ct. 1677; *United States v. Adcock*, (6th Cir. 1973) 47 F.2d 637 (Not sustainable); *United States v. Marotta*, (9th Cir. 1975) 518 F.2d 681 (Sustainable). Today we even the score at 2-2.

Thus the Defendants in *Honneus* and *Adcock* had their sentences reduced as a matter of law to 5 years; whereas, the present Defendants and the Defendant in *Marotta* received sentences of 10 years.

This circuit division was not based on any factual distinction but solely on the divided interpretation of the double jeopardy clause and of the congressional intent of the present statutes. In the opinion below and in the case of *Marotta* the courts opinioned that the double jeopardy clause allowed such cumulative sentence where prosecution was based on two distinct statutes and that Congress had intended to attack the drug trade with severity. In contrast, the opposing view of two circuits is epitomized in the following quotation from *Honneus:*

> While undoubtedly Congress meant to attack the drug trade with severity . . . we doubt that it meant to authorize, or could authorize, a court to impose three punishments for one conspiracy. Congress may treat different aspects of the same conduct as separate crimes only if there is meaningful distinction between the elements constituting each offense. 508 F.2d at 569.

(b). Supreme Court Background

The issue of whether a single agreement may be made into several conspiracies has been addressed by the Supreme Court on three occasions in the distant past. In *Frohwerk v. United States,* (1919) 294 U.S. 204, 63 L.Ed. 561, 39 S.Ct. 249, the Court in considering the duplicity of a single count conspiracy indictment which contemplated the violation of more than one substantive statute, enunciated the rule that "the conspiracy is the crime, and that is one, however diverse its objects" 294 U.S. at 210. Thereafter, in *Braverman v. United States,* (1942) 317 U.S. 49, 87 L.Ed. 23, 63 S.Ct. 99, the Court was confronted with a single agreement to violate two sections of the Internal Revenue Code. This case involved the violations of the general conspiracy statute and the Court concluded that a single agreement could make but a single crime.

Subsequently in *American Tobacco Company v. United States,* (1946) 328 U.S. 781, 90 L.Ed. 1575, 66 S.Ct. 1125, the Court was confronted with two conspiracy statutes under the Sherman Anti-Trust Act (S.1, Conspiracy to Monopolize and S.2, Conspiracy to Fix

Prices). Certiorari was not granted as to the particular question in which we are involved but the Court in dicta distinguished *Braverman* by saying:

> "We have *here* separate statutory offenses . . . since one is made criminal by Section 1 and the other by Section 2 of the Sherman Act. We believe also that in accordance with the *Blockburger* case, Sections 1 and 2 of the Sherman Act require proof of conspiracies which are reciprocally distinguishable from and independent of each other although the objects of the conspiracies may partially overlap." 328 U.S. at 788. (Emphasis added)

In *American Tobacco Company*, the Court found that the conspiracy to monopolize trade was distinguishable and independent from a separate conspiracy to fix prices; in the present case it is undisputed by the government or the present opinion that the instant conspiracy was single.

These Supreme Court cases leave obscure answers to essential issues in the present cases; moreover, the passage of the Controlled Substances Act of 1970 has dramatically and repeatedly raised the issue left unanswered by the above cases. The central issue presented is whether the agreement is the only essential gravamen of the offense of conspiracy for the purposes of applying the "same evidence" test of the double jeopardy clause or whether the substantive objects of the conspiracy are parts of the gravamen for this purpose. In order to demonstrate two conspiracies under double jeopardy, must the agreement be distinguishable by place, person, time, overt acts, trans-

actions, (as was done in *American Tobacco*) or may one agreement be made into two crimes by solely distinguishing the substantive objects of the agreements or the statutes violated?

(c.) Circuit Confusion With the Same Evidence Test

A full analysis of the doctrine of double jeopardy as it relates to conspiracy and the "same evidence" test is needed by Supreme Court review. The Supreme Court adopted the "same evidence" test in the case of *Gavieres v. United States*, (1901) 220 U.S. 338, 55 L.Ed. 489, 31 S.Ct. 421, in which the Court adopted the rule in *Morey v. Commonwealth*, 108 Mass. 433. This rule was enunciated in *Blockburger v. United States*, (1932) 284 U.S. 299, 76 L.Ed. 306, 52 S.Ct. 180, in which the Court stated that the test of "whether there are two offenses, or only one, is whether each provision requires proof of an additional fact which the other does not." 284 U.S. at 304. This rule has been substantially qualified by a series of divisive decisions concerning consecutive sentences in single prosecutions. See: *Consecutive Sentences in Single Prosecutions: Judicial Multiplication of Statutory Penalties*, 67 Yale L.J. 916, and the many cases therein cited.

Most currently courts are looking to the essence of the elements to differentiate crimes. *United States v. Belt*, (8th Cir. 1975) 516 F.2d 873, is a good example of the court distinguishing the essential elements of the offense under the *Blockburger* case. There, the Court found that larceny and robbery could not be charged for a single act in spite of the technical distinction of elements. Recent developments in the statutory area, in which we are presently involved, include two cir-

cuits which have repeatedly found that possession of heroin are the same for the purposes of double jeopardy when they arise out of the same act. *United States v. Curry*, (8th Cir. 1975) 512 F.2d 1200; *United States v. Atkinson*, (8th Cir. 1975) 512 F.2d 1235; *United States v. King*, (6th Cir. 1975) 521 F.2d 356; *United States v. Stevens*, (6th Cir. 1975) 521 F.2d 334. See also, *United States v. Mazzochi*, (2nd Cir. 1935) 75 F.2d 497, ("preposterous" to make each sale of a narcotic support a separate conspiracy count); *United States v. Mallah*, (2nd Cir. 1974) 503 F.2d 971, ("same evidence" test must be re-analyzed when dealing with narcotics conspiracies — agreement is the essential gravamen of a crime).

(d.) Statutory Intent

The present circuit division also conflicts as to interpretation of the statutes in question. An issue evolves as to whether the rule of lenity should resolve such an ambiguity. This rule of lenity which provides that multiple punishments will not be imposed unless clearly indicated by legislation, has been repeatedly used by the Supreme Court. *In re: Bonner*, (1894) 151 U.S. 242, ("the law of our country takes care, or should take care, that not the weight of a Judge's finger shall fall upon anyone except as specifically authorized"). *Burton v. United States*, (1906) 202 U.S. 344 at 377, ("a legislature, not the court which . . . defines a crime and ordains its punishment"). The leading case is *Prince v. United States*, (1957) 352 U.S. 322, 1 L.Ed.2d 370, 77 S.Ct. 408, where cumulation for entering a bank and robbing a bank was considered and the Court provided:

> "While reasonable minds might differ on this conclusion, we think it is consistent with our policy of not attributing to Congress, in the enactment of criminal statutes, an intention to punish more severely than the language of the laws clearly imports in the light of pertinent legislative history." 352 U.S. at 329.

The rule was described in *Bell v. United States*, (1955) 349 U.S. 81, 99 L.Ed. 905, 75 S.Ct. 620, as follows:

> "It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment . . . It merely means that if Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses . . ." 349 U.S. at 83.

And then again in *Ladner v. United States* (1958) 358 U.S. 169, 3 L.Ed.2d 199, 79 S.Ct. 209, as follows:

> "This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." 358 U.S. at 178.

Thus, applying the rule of lenity would resolve an ambiguity in the statutes which obviously exists — as evidenced by the present division amongst the cir-

cuits. The opinion below cites *Gore v. United States*, (1958) 357 U.S. 386, 2 L.Ed.2d 1405, 78 S.Ct. 1280, which might fairly be interpreted as stating that Congress did not intend lenity in the passage of the Harrison Act of 1956. However, the last eighteen years have brought many changes in the legislative history of narcotics and provide many distinctions which contrast the *Gore* case. The opinion below, by quotation, points out that the *Gore* case dealt with provisions that were "passed at three different periods" and which dealt with a severe "scale of punishments". The present Defendants would rely on the distinctions as were cited in *United States v. Clements*, (6th Cir. 1972) 471 F.2d 1253, which dealt with multiplication of punishment on the unlawful making of a firearm. There the court cited *Prince*, supra., and the many other Supreme Court decisions and distinguished *Gore*, supra., on the fact that all of the offenses were rooted in one legislative enactment. Likewise, the present prosecutions are based on the Controlled Substances Act of 1970 which in one enactment provided ambiguously for all the punishments, the construction of which is herein disputed. This Act was based on the proposition that a severe "scale of punishment" will not solve the marijuana problem. See 1970 *U.S. Code Cong. and Admin. News*, 4566 (where such a conclusion was labeled a "fable"). A summary of the various sentence reductions which were provided for by the new Act in 1970 is provided at 1970 *U.S. Code Cong. and Adm. News*, 4640, which demonstrates a return to a rehabilitative approach rather than retributive approach. For example, the punishment for the importation of marijuana was reduced to a 5 year maximum which allowed probation or suspended sentence. Previously, 5 years had been the minimum with no

probation or suspended sentence. Moreover, the opinion below would reverse this legislative trend since the old Harrison Act did not provide for such a duplicate punishment, and yet the present opinion would allow for such cumulative punishment under a recent legislative enactment which patently was intended to reduce the severity of prison sentences.

(d). The Doctrine of
"expressio unius est exclusio alterius"

Congress did, in fact, consider the problem of cumulative punishment in both subchapters of the Act in question. The Sections 21 U.S.C. 847 and Section 21 U.S.C. 963 are the sections that immediately follow each of the questioned statutes respectively. Both statutes read as follows:

> "Any penalty imposed for a violation of this subchapter shall be in addition to, and not in lieu of, any civil or administrative penalty or sanction authorized by law."

Note that the two statutes in question and the two statutes here cited appear in separate subchapters of the Controlled Substance Act. Congress, by these Acts, and when addressing the problem of cumulative sentences could easily have solved the problem of construction by adding the word "criminal" to the above statutes. They did not do so and under the doctrine of "expressio unius est exclusio alterius", criminal sanctions are best construed as excluded from the specific list of sanctions which the legislature intended to be cumulated under the above statutes.

(2) The Imposition Of A Second Judgment And Sentence After A Previous Conviction Based Upon The Identical Offense Offended Basic Constitutional Tenets Of Double Jeopardy And Due Process.

(a.) Double Jeopardy

It is undisputed that the present prosecution was begun over five months after Defendants had entered a plea and had been sentenced in the State of New Mexico. Meanwhile, the Defendants had resumed their lives anew and were abiding by the terms of their probation when sealed indictments were returned on them. The federal prosecution had been rethinking its case and was preparing a "second shot" by attempting to untaint the poison fruit. This untainting was a complete failure according to their own reports (R.pp.964-966) and under the opinion below which reversed as to the major parties who had standing to object to the illegal wiretap. The prosecutorial motive is obvious from the Grand Jury minutes (R.p.948) and the sentiments of the agents on the stand (R.p.288). The harsher sentence sought by such a dual prosecution was never obtained against the primary parties but left the present Defendants the only, if secondary, victims of this dual prosecution.

The dual sovereignty theory cited by the government appears to be a legal fiction within a jurisprudence abstraction and contrary to the clear dictates of the supremacy clause of the United States Constitution and the evolving realities of the United States criminal justice system.

The cases of *Bartkus v. Illinois*, (1959) 359 U.S. 121, 3 L.Ed.2d 684, 79 S.Ct. 676, and *Abatte v. United States*, (1959) 359 U.S. 187, 3 L.Ed. 729, 79 S.Ct. 666 represent the proposition that the state and the nation are sovereign and that prosecution by each for the same facts does not offend double jeopardy. These cases were both 5-4 decisions written in 1959. The dissents are learned and comprehensive and the Defendants, herein, would adopt the logic of the dissents in both cases particularly the words of Justice Douglas which read as follows:

> "The legal logic used to prove one thing to be two is too subtle for me to grasp . . . I also am not convinced that a state and the nation can be considered two wholly separate entities for the purpose of allowing them to do together what, generally, neither can do separately."

These two cases were also decided before the decision in *Benton v. Maryland*, (1969) 359 U.S. 784, 23 L.Ed.2d 707, 89 S.Ct. 2056, which overruled *Palko v. Connecticut*, (1937) 302 U.S. 319, 82 L.Ed. 288, 58 S.Ct. 149, and finally ruled that the double jeopardy clause is a deep seated concept of fairness the violation of which offended the due process clause of the Fourteenth Amendment. If the concept of double jeopardy is so ingrained as to be part of due process, then surely such an integral concept of justice could not now countenance such a double prosecution based on a legal abstraction.

In the interim between *Bartkus* and *Benton* the Court has eliminated many such legal abstractions, e.g., the

"silver platter" doctrine, *Elkins v. United States*, (1966) 364 U.S. 206, 4 L.Ed.2d 1669, 80 S.Ct. 1437. The time has come to clearly overrule *Bartkus*. See *United States v. Knight*, (D.C. Cir. 1974) 509 F.2d 354, 360 n.n. 13-14, (questioning the continued vitality of the *Bartkus* dual sovereignty doctrine after *Benton v. Maryland*).

(b.) Due Process

The present prosecution violates the due process clause of the United States Constitution in that it invidiously discriminates against the present Defendants. The present Defendants were arbitrarily and capriciously selected on the basis of an officer's dissatisfaction with a state sentence. The selectivity of the federal prosecutors in not prosecuting all or even a substantial number of thousands of completed state narcotic cases over which they have concurrent jurisdiction is obvious. This may reduce the danger of having *Bartkus*, supra., overruled but is not any consolation to these hapless Defendants who are invidiously selected. This unjustifiably selective prosecution offends the Defendants' constitutional rights of due process under the Fifth Amendment. *Yick Wo v. Hopkins*, (1886) 118 U.S. 356, 30 L.Ed. 220, 6 S.Ct. 1064 (selective prosecution under the Fourteenth Amendment); *Johnson v. Robinson*, (1974) 415 U.S. 361, 39 L.Ed.2d 389, 94 S.Ct. 1160 (incorporating the basic tenets of the equal protections clause within the due process clause of the Fifth Amendment).

(c.) Violation of the "Petite" Policy

The present dual state-federal prosecution is in clear violation of Justice Department policy against

duplicating state-federal prosecutions, which was formally defined by Attorney General of the United States in a memorandum to the United States Attorney, (Department of Justice Press Release April 6, 1959). This policy was first implemented by the Justice Department at the Supreme Court level in the case of *Petite v. United States*, (1960) 361 U.S. 529, 4 L.Ed.2d 490, 80 S.Ct. 450, in which the Court, on a motion of the government and under the Court's supervisory power granted by 28 U.S.C. Sec. 2106, dismissed charges brought in violation of this established policy. This policy, the present statement of which is quoted in full at the beginning of this petition, is violated by the present prosecution in that there are no "compelling federal interest involved" nor was "prior authorization . . . obtained from the appropriate Assistant Attorney General having jurisdiction over the subject matter of the case". The Supreme Court has routinely remanded cases "to permit the government to dismiss the charges", even when government counsel fails to discover a *Petite* violation until the case has reached the High Court. See, e.g., *Watts v. United States*, (1975) 422 U.S. 1032, 45 L.Ed.2d 688, 95 S.Ct. 2648; *Ackerson v. United States*, (1975) 419 U.S. 1099, 42 L.Ed.2d 796, 95 S.Ct. 769; *Hayles v. United States*, (1974) 419 U.S. 892, 42 L.Ed.2d 136, 95 S.Ct. 168.

This policy is consistent with the statutory directive adopted by most of the states. 48 of the 50 states have adopted either the Uniform Narcotic Drug Act or the Uniform Controlled Substances Act which specifically prohibit such dual prosecution. See 9 Uniform Laws Annotated 24, 146 (Supp.1975); Uniform Controlled Substances Act Sec. 405; Uniform Narcotic Drug Act Sec. 21.

CONCLUSION

The opinion below clearly highlights a circuit division which dramatically affects substantial constitutional rights of the Defendants and which begs clarification for a uniform maximum sentence under the questioned statutes in all the circuits. Further, the dual prosecution under the *Bartkus* doctrine and in violation of the *Petite* policy prays resolution of questions concerning dual prosecution under the double jeopardy and due process clauses. For the foregoing reasons, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, HARRY TOM PETERSEN, a member of the Bar of the Supreme Court of the United States, hereby certify that, on the ____ day of June, 1976, I served copies of the foregoing Petition for a Writ of Certiorari to the Supreme Court of the United States by mailing a copy thereof to the office of Jeremiah Handy and by mailing three copies in a duly addressed envelope, with air mail postage prepaid, to The Solicitor General, Department of Justice, Washington, D.C. 20530.

_____

HARRY TOM PETERSEN

APPENDIX

UNITED STATES of America,
Plaintiff-Appellee,

v.

Martin W. HOULTIN, Robert Burke, Duane Morrison, Michael Francis, Kenneth B. Phillips and Kenneth J. Croucher, Defendants-Appellants.

No. 74-4144.

United States Court of Appeals,
Fifth Circuit.

Jan. 12, 1976.

Appeal from the United States District Court for the Western District of Texas.

Before JONES, WISDOM and AINSWORTH, Circuit Judges.

WISDOM, Circuit Judge:

This case presents two serious questions. (1) Were the arrests of alleged importers of marijuana procured through the exploitation of illegal wiretaps? (2) Were the convictions for both conspiracy to import and conspiracy to possess the drug, despite the existence of only one conspiratorial agreement, in violation of the defendants' protections against double jeopardy.

For several years before their arrests, the defendants-appellants, Martin W. Houltin, Robert

Burke, Duane Morrison, Michael Francis, Kenneth B. Phillips, and Kenneth J. Croucher, had been under extensive investigation for narcotics smuggling activities. Agents of the State of New Mexico applied to a state court for authorization to intercept telephone communications from Houltin, Morrison, and Burke. The court granted the request and, later, a request for an extension of the authorization. Two of the intercepted telephone calls allegedly indicated that the conspirators had arranged to meet at the Columbus, New Mexico airport at a given time. The dogged surveillance of the agents led them to Mexico, where Houltin, Morrison, and Burke picked up 2260 pounds of marijuana, and returned to New Mexico. There, all the defendants were arrested and the marijuana seized.

After their arrests the defendants entered pleas of nolo contendere to various state charges, and each was assessed an 18 month probated sentence and fined $1,000 by a New Mexico state court. Five months later they were indicted by a federal grand jury for alleged violations growing out of the same acts that were the subject of the state charges. The district judge found that the state wiretaps were illegal and granted the defendants' motion to suppress the evidence obtained from those wiretaps.[1] In his pretrial order, the trial judge stated that in his opinion the wiretaps did not contribute to the apprehension of the defendants or to

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1 The wiretaps were held illegal apparently because of noncompliance with 18 U.S.C. § 2516(2), which requires the "principal prosecuting attorney of any state, or the principal prosecuting attorney of any political subdivision thereof" to apply to a state court judge for an order authorizing a wiretap. The wiretap applications in this case were signed only by an assistant district attorney.

the seizure of the marijuana they were transporting. but he left this question to be decided by the jury. He denied, however, the motion to suppress the marijuana. The jury, after being instructed to find beyond a reasonable doubt that the arrests would have occurred even without the wiretaps, found each defendant guilty of two conspiracy counts. The trial judge sentenced each to consecutive five-year terms of imprisonment on each count and imposed varying fines on the defendants.

I.

All the defendants contend that their arrests and the seizure of the marijuana were fruits of the illegal wiretaps which fatally infected their convictions. The two wiretaps that the district court found illegal — a finding that the government does not now challenge — were of a telephone conversation between Houltin and his wife and another between Mrs. Houltin and Phillips's wife. First, we must determine who has standing to challenge the legality of the wiretaps. Second, we must determine whether the arrests and the imported marijuana were obtained through exploitation of the illegal wiretaps.

A. Standing

The government argues that only Houltin has standing to make the challenge. This argument overlooks the second telephone conversation, the one between Mrs. Houltin and Mrs. Phillips. This call was also an integral part of the investigation leading to the arrests. In *Alderman v. United States*, 1969, 394 U.S. 165, 176, 89 S.Ct. 961, 968, 22 L.Ed.2d 176, 188, the

Supreme Court held that "any petitioner would be entitled to the suppression of government evidence originating in electronic surveillance . . . if the United States unlawfully overheard conversations of a petitioner himself or conversations occurring on his premises, *whether or not he was present or participated in those conversations*". (Emphasis supplied). Since Mrs. Phillips, a participant in the second wiretapped conversation, was speaking from defendant Phillips's home, *Alderman* grants him standing to challenge the legality of that wiretap and the admission of evidence to which it led the government.

This leaves open the question whether the other four defendants, who were not participants in the intercepted conversations and who did not own the property on which the intercepted calls were placed, have standing to challenge the legality of the wiretaps.

In a recent case this Court studied the Fourth Amendment law of standing, from the enactment of the amendment to present times. We stated the relevant test as follows:

> [D]efendants must demonstrate a 'legitimate interest' of some kind in the premises searched or the objects seized. . . . [T]he decisive factor in determining whether a search or seizure is 'reasonable' for Fourth Amendment purposes is whether the complaining party's reasonable expectations of privacy have been unreasonably disturbed.

United States v. Hunt, 5 Cir. 1974, 505 F.2d 931, 939-40, cert. denied, 421 U.S. 975, 95 S.Ct. 1974, 44 L.Ed.2d 466.

Burke, Morrison, Francis, and Croucher had no reasonable expectation of privacy in the wiretapped conversation their coconspirator Houltin had with his wife and that which Mrs. Houltin had with Mrs. Phillips. Indeed, in the recent case of *United States v. Scasino*, 5 Cir. 1975, 513 F.2d 47, 50, we indicated that such a privacy interest may only be asserted by "one who participated in the intercepted conversation or on whose premises the conversation occurred".[2] And in *Alderman*, 394 U.S. at 171-72, 89 S.Ct. at 965, the Supreme Court stated in unambiguous terms:

> The established principle is that suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence. Coconspirators and codefendants have been accorded no special standing.[3]

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2 We also obtain guidance from *United States v. Garcilaso de la Vega*, 2 Cir. 1974, 489 F.2d 761. In that case the government used an illegal wiretap in an investigation of the marijuana trafficking of Juan Santos. The intercepted conversation that was the subject of a motion to suppress was between Santos and a third party and led to the apprehension of the appellant, who was Santos's supplier. The court denied standing to the appellant because his phone was not tapped and he was not a party to the intercepted conversation. As in the present case, it was foreseeable to the police that the information obtained from the wiretap would lead to the apprehension of the appellant, who was a coconspirator of the party whose phone was tapped.

3 According to Fed.R. Crim.P. 41(e) and 18 U.S.C. § 2518(10)(a), an "aggrieved person" may move to suppress evidence derived from an illegal wiretap. The statutory phrase does not liberalize the common law of standing. *See United States v. Calandra*, 1974, 414 U.S. 338, 348, n. 6, 94 S.Ct. 613, 38 L.Ed.2d 561. That phrase is defined

We hold, therefore, that only Houltin and Phillips have standing to challenge the legality of the two wiretaps at issue.

B. Exclusion of the Tainted Evidence

The "prime purpose" of the Fourth Amendment exclusionary rule "is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable search and seizures". *United States v. Calandra*, 1974, 414 U.S. 338, 347, 94 S.Ct. 613, 619, 38 L.Ed.2d 561, 571. The essence of that rule "is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all".[4] *Silverthorne Lumber Company v. United States*, 1920, 251 U.S. 385, 392, 40 S.Ct. 182, 183, 64 L.Ed. 319, 321. The determination whether information gained by the police in an illegal search was used to obtain other evidence against the accused is not based upon whether the subsequent evidence would not have come to light but for the illegal actions of the police, but rather upon "whether, granting establishment of the primary illegality, the evidence to which [the] ob-

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in 18 U.S.C. § 2510(11) as "a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed". Moreover, in *Alderman*, 394 U.S. at 175, n. 9, 89 S.Ct. at 968, the Court held that " 'aggrieved person' . . . should be construed in accordance with existent standing rules".

4 This rule is codified in 18 U.S.C. § 2518(10)(a), which authorizes the suppression of "the contents of any [unlawfully] intercepted wire or oral communication, *or evidence derived therefrom* . . . ." (emphasis supplied). This "fruit of the poisonous tree" doctrine "is a response to the realization that if police officers are permitted to use knowledge gained from unlawfully obtained evidence to obtain the same or other valuable evidence legally, an inducement to commit such unlawful practices continues to exist". Comment, Fruit of the Poisonous Tree — A Plea for Relevant Criteria, 115 U.Pa.L.Rev. 1136, 1138 (1967).

jection is made has been come at by exploitation of the illegality or instead by means sufficiently distinguishable to be purged of the primary taint". *Wong Sun v. United States*, 371 U.S. 471, 487-88, 83 S.Ct. 407, 417, 9 L.Ed.2d 441, 455, *quoting* Maguire, Evidence of Guilt 221 (1959).

Evidence should be excluded only where the benefit accruing to society from the additional deterrent against unlawful police practices equals or exceeds the detriment to society caused by the release of criminals. Hence, two exceptions to the exclusionary rule of *Silverthorne* have developed. *See* Comment, Fruit of the Poisonous Tree — A Plea for Relevant Criteria, 115 U.Pa.L. Rev. 1136, 1138 (1967). We set out these two exceptions in *United States v. Castellana*, 1974, 488 F.2d 65, 67, *rev'd on other grounds*, 500 F.2d 325 (en banc): "First, the connection between the lawless conduct of the police and the discovery of the challenged evidence may 'become so attenuated as to dissipate the taint.' *Nardone v. United States*, 1939, 308 U.S. 338, 341, 60 S.Ct. 266, 268, 84 L.Ed. 307, 312. . . . The second means for 'purging the taint' is discovering the same evidence from an 'independent source.' [*Silverthorne*, 251 U.S. at 302, 40 S.Ct. 182]".

It was established in *Nardone*, 308 U.S. at 341, 60 S.Ct. 266, that the accused has the burden of proving both that the wiretap was unlawfully employed and that a substantial portion of the evidence against him was fruit of that poisonous tree. The prosecution is then given an opportunity to prove that the subsequently obtained evidence falls within one of the recognized exceptions to the exclusionary rule of *Silverthorne*.

In order to determine which party, if either, has carried its burden, it will be necessary to construct a detailed account of the events leading to the arrests. In December 1971 Operation Sky Night began. This was a joint federal-state investigation sponsored by the Drug Enforcement Administration (D.E.A.) and aimed at the suspected conspiracy of the defendants (among others) to import marijuana into New Mexico by aircraft. By September 1973 the government admitted that its investigative procedures had failed and applied to the state court in New Mexico for authorization to tap the telephones of Houltin, Morrison, and Burke. The application was granted and the telephones were tapped between September 27 and October 12, 1973.

On the latter date the nearly two-year drought of Operation Sky Night finally came to an end. Gerald Weatherman, an agent-pilot for the D.E.A., had been responsible for the surveillance of the defendants for over a year and a half. On October 12, he observed Houltin, Burke, and Francis leave an El Paso coffee shop at about 1:00 p.m. and proceed toward the Sunland Park Airport, which was just across the New Mexico border. Weatherman then went to the El Paso International Airport, boarded his aircraft, and flew over the Sunland Park Airport, where he observed the defendants' departure in their planes.

Weatherman was unaware that Houltin had placed a telephone call to his wife from the Sunland Park Airport. He asked her to "call the man . . . [a]nd tell him we're running a little bit late and it'll be about two o'clock". He also told her to cancel their social plans for the evening. His wife then called Mrs. Phillips and

told her, in part, "[w]ill you tell your old better half that they're running a little bit late and he'll be in at two o'clock". The reference to two o'clock was apparently the time at which Houltin expected to arrive in Columbus, New Mexico. Tommy Holder, the state police officer who was manning the wiretaps in Columbus, intercepted both of the conversations, which occurred between 1:17 p.m. and 1:23 p.m. Holder then informed "Sector" (the El Paso headquarters of Operation Sky Night) of the substance of the intercepted conversations. The key question in this case is whether the conspirators were subsequently arrested through government exploitation of information obtained from these wiretapped conversations.

The plot continues. Agent Weatherman observed Houltin, Burke, and Francis depart from the Sunland Park Airport at about 1:30 p.m. and followed them in his aircraft to Columbus, where the defendants landed at about 2:00 p.m. Weatherman then returned to the El Paso Airport for refueling, arriving at about 2:30. He testified that he had intended to "relax for a little while" at the airport before returning to Columbus to continue the surveillance. The relaxation was cut short by a phone call Weatherman received from Sector indicating that "all the people were at the airport at Columbus, so I'd better get back over there, and start surveillance again". Weatherman then left El Paso at about 2:50 and arrived at the Columbus Airport at 3:30, just in time to observe the defendants' departure. He testified that he left the El Paso Airport immediately after receiving the phone call from Sector, and that had he not received that call he would not have arrived in Columbus in time to observe the departure of the defendants. Weatherman then followed the defendants

to the location in Mexico where they picked up the marijuana, and then back to New Mexico, where he directed ground forces in the apprehension of the defendants and the seizure of the marijuana.

The above summary of the evidence indicates that the defendants have carried their burden of proving that their apprehension and the marijuana seizure resulted from the exploitation of information gleaned from the illegal wiretaps. The government, in rebuttal, contends that the crucial phone call from Sector to Weatherman was based upon a source independent of the information obtained from the two intercepted telephone conversations. This contention is based on the alleged actions of agent Holder after he intercepted those two conversations and relayed the information to Sector. He then left the wiretap center and went to the Columbus Airport, where he saw the appellants' planes take off at about 3:30.[5] He immediately called Sector to report his observation.

The government argues that the key call from Sector to Weatherman was based on information obtained from the *second* call from Holder to Sector. The times that the various calls were placed reveals the fatal flaw in the government's argument. The key call to Weatherman was placed between 2:30 and 2:50; Holder testified that his second call to Sector was placed after he observed the appellants' planes leave the Columbus airport, which was at about 3:30. It was therefore not possible that the second call from Holder

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5 Both the testimony of Sgt. Holder and the report of agent Weatherman filed shortly after these incidents are in agreement that the defendants' planes departed from the Columbus Airport at about 3:30 p. m.

could have been the basis for the call from Sector that Weatherman received at the El Paso Airport. Moreover, Holder's second phone call was placed *after* he observed the defendants' planes depart from the Columbus Airport, but the key call from Sector to Weatherman had to have been placed sufficiently before the defendants' departure to give Weatherman enough time to fly the approximately thirty-minute flight from El Paso to Columbus in time to observe the defendants leave. We therefore conclude that there was no source for the key phone call to Weatherman that was independent of the information gleaned from the illegally intercepted calls.

The government next contends that the arrest of the defendants and the seizure of the marijuana were not achieved through "exploitation" of the illegally monitored conversations because, even without the alert from Sector, agent Weatherman would have returned to Columbus and, after discovering that the defendants had already departed, would have proceeded to Mexico. This argument is based on the "inevitable discovery" doctrine, which this circuit has unambiguously rejected. *Parker v. Estelle*, 5 Cir. 1974, 498 F.2d 625, 629-30 n. 12, cert. denied, 421 U.S. 963, 95 S.Ct. 1951, 44 L.Ed.2d 450; *United States v. Castellana*, 488 F.2d at 68.

Finally, the government argues that the intricate work of its agents in tracking the defendants to Mexico and then back to New Mexico and in coordinating the arrests rendered the connection between the illegal wiretaps and the arrests sufficiently attenuated so as to dissipate the taint of those wiretaps. Two recent

decisions by this Court illustrate the circumstances in which the "attenuation" exception is applicable. In *United States v. Owen*, 5 Cir. 1974, 492 F.2d 1100, cert. denied, 419 U.S. 965, 95 S.Ct. 227, 45 L.Ed.2d 709, the government illegally searched Owen's car, found a revolver, and then arrested Owen for his possession of the weapon. While at the police station, Owen was told by a postal inspector that he was suspected of mail fraud and was invited to return to discuss the matter. He returned in four days and on several later occasions and eventually confessed and agreed to cooperate with the government's investigation of the mail fraud conspiracy in return for a government recommendation of leniency as to Owen's punishment. Owen later challenged that agreement and certain evidence obtained pursuant to the agreement on the ground that they were tainted by the illegality of the original search of his car. We held that the taint had been dissipated by the time Owen agreed to cooperate in the mail fraud investigation.

In *Parker v. Estelle*, Parker's confession to the killing of his father was suppressed by the trial judge. Before Parker's confession, the Parker family gardener, Morales, had indicated to the police that he saw or heard nothing suspicious at the time of the death. Some time after being informed of Parker's confession, Morales changed his statement, indicating that he heard two gun shots and then saw Parker flee from the scene. The government relied exclusively on this testimony at trial, and Parker was convicted. On appeal, Parker challenged the admission of Morale's testimony, contending that it was the fruit of the invalid confession. We held that whatever connection there may have been between Parker's confession and

Morale's testimony was so attenuated as to dissipate the taint.

In both cases the challenged evidence had so many possible sources apart from the original illegality that it was doubtful that the illegality was even a "but for" cause of the procurement of the challenged evidence. For example, in *Owen* we expressly relied upon the voluntariness of Owen's subsequent visits to the postal inspector's office, the quid pro quo given for Owen's cooperation, and the four-day time lapse between the arrest and the initial discussion between Owen and the inspector. 492 F.2d at 1107. In *Parker* we noted that "[t]he exact reason why Morales decided to tell the truth cannot be discerned from the record before us" and that "the facts will not permit us to tie the acquisition of the evidence clearly and directly to the confession . . . ." 498 F.2d at 630. In the present case, however, the arrests occurred on the same day that the illegally obtained evidence was procured and, as the above summary of the record clearly establishes, those wiretaps were a "but for" cause of the later arrests. Moreover, the nearly two-year fruitless investigation of the marijuana smuggling activities of the defendants indicates that their arrests on October 12 were secured through exploitation of the evidence obtained from the wiretaps, which had been instituted only about two weeks earlier.

Because the primary purpose of the exclusionary rule is deterrence, "[t]he critical question when dealing with attenuation should be whether the admissibility of the challenged evidence will create an incentive for illicit police activity in the future". Pitler, "The Fruit of the Poisonous Tree" Revisited and

Shepardized, 56 Calif.L.Rev. 579, 646 (1968). In *Parker*, after noting that it was beyond the scope of the unlawful purpose of the police in obtaining Parker's confession to secure information from Morales, we observed that the exclusion of the confession would be "an ample deterrent". 498 F.2d at 630. In the present case, however, the police would not be adequately deterred by exclusion of the conversations intercepted by the wiretap. They would still have an incentive to make illegal wiretaps to obtain information that would *lead to* the arrest of the suspects. We therefore hold that, in order to effectuate the deterrent purpose of the Fourth Amendment exclusionary rule, it is necessary to reverse the convictions of Houltin and Phillips because they were based on evidence derived through exploitation of illegal wiretaps. *See* Pitler, 56 Calif.L.Rev. at 641-46; Comment, 115 U.Pa.L.Rev. at 1148-49.

II.

The appellants argue that their protections against double jeopardy were violated by the imposition of consecutive sentences for the offenses of conspiring to possess (21 U.S.C. § 846) and conspiring to import marijuana (21 U.S.C. § 963). In addition, they contend that the indictment was duplicitous and led to a multiplicity of punishments for a single offense. They assert that there was only one conspiratorial agreement, and that, therefore, no matter how many illegal objects existed, there was only one conspiracy. Three circuits have decided this issue. Two have held that multiple prosecutions are not sustainable under the above two conspiracy provisions. *United States v. Honneus*, 1 Cir. 1974, 508 F.2d 566 (not sustainable),

cert. denied, 421 U.S. 948, 95 S.Ct. 1677, 44 L.Ed.2d 101; *United States v. Adcock*, 6 Cir. 1973, 487 F.2d 637 (not sustainable); *United States v. Marotta*, 9 Cir. 1975, 518 F.2d 681 (sustainable). Today we even the score at two-two.

Assuming that there was only one conspiracy in the present case, Congress may choose to punish two aspects of that behavior without contradicting the Double Jeopardy Clause. In *Gore v. United States*, 1958, 357 U.S. 386, 78 S.Ct. 1280, 2 L.Ed.2d 1405, the petitioner was prosecuted for the violation of three statutes by one sale of heroin. In rejecting his contention that this multiple prosecution violated his double jeopardy protections, the Supreme Court stated:

> It seems more daring than convincing to suggest that three different enactments, each relating to a separate way of closing in on illicit distribution of narcotics, passed at three different periods, for each of which a separate punishment was declared by Congress, somehow or other ought to have carried with them an implied indication by Congress that if all these three different restrictions were disregarded but, forsooth in the course of one transaction, the defendant should be treated as though he committed only one of these offenses. . . . Both in the unfolding of the substantive provisions of law and in the scale of punishments, Congress has manifested an attitude not of lenity but of severity toward violation of the narcotics laws.

357 U.S. at 390-91, 78 S.Ct. at 1283-84. Similarly, in the present case, there are two different criminal stat-

utes, each relating to different aspects of a conspiracy to import and distribute narcotics, and each prescribing separate punishments. For these reasons we respectfully disagree with the two Courts of Appeals that have held that separate convictions cannot be obtained under §§ 846 and 963 when there is only one conspiratorial agreement.

We strongly endorse, however, the reasoning of the Ninth Circuit in *United States v. Marotta*, 518 F.2d at 685, in which the Court upheld convictions under the two above statutes:

> The validity of appellant's convictions does not turn on whether there was one conspiracy or two. Congress has defined the evils to be prohibited as conspiracies with specified criminal objects. Granting that appellant was engaged in a single conspiracy with dual criminal objects, this court finds that Congress fully intended to permit punishing such conspiracies twice as severely as those which embraced only one of the specified criminal objects. . . . Congress has in effect determined that a conspiracy to import drugs with intent to distribute is twice as serious as a conspiracy to import for personal use or a conspiracy to possess with intent to distribute. Such a determination does not offend the double jeopardy clause . . . .

Our decision today is fully consistent with two cases on which the appellants rely, *Braverman v. United States*, 1942, 317 U.S. 49, 63 S.Ct. 99, 87 L.Ed. 23; and *United States v. Mori*, 5 Cir. 1971, 444 F.2d 240, cert. denied, 404 U.S. 913, 92 S.Ct. 238, 30 L.Ed.2d 187. In

Braverman the Court held that when there is a single agreement to violate several substantive statutes, the conspirators may not be prosecuted for more than one violation of the statute prohibiting conspiracies against the United States, presently 18 U.S.C. § 371. This holding reflected the Court's view that the congressional intent underlying that section was to adopt the common law definition of conspiracy, thereby proscribing the *agreement* to commit unlawful acts against the United States rather than the unlawful objects themselves.[6] In *Mori* we held that a single conspiracy to import heroin may not be held violative of both the general conspiracy statute, 18 U.S.C. § 371, and the statute that specifically proscribes conspiracies to import narcotics.[7] We held, as a matter of statutory construction, that "the catchall provisions of [the former] section 371 become subsumed under the particular, specific provisions of [the latter] section 174". 444 F.2d at 245.

Unlike these cases, the present case involves *two specific* conspiracy statutes. We agree with the Ninth Circuit that Congress intended to punish conspiracies violating both statutes twice as severely as those violating only one of the statutes.

We have considered the defendants' other arguments and find each to be without merit. Before concluding, we note the seemingly anomalous result this opinion has achieved: the convictions of Houltin

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6 The Court stated that "[t]he single agreement is the prohibited conspiracy, and however diverse its objects it violates but a single statute, [18 U.S.C. § 371]". 317 U.S. at 54, 63 S.Ct. at 102.

7 The statute, 21 U.S.C. § 174, has since been repealed, but its relevant portion is similar to 21 U.S.C. § 963, which is at issue in the present case.

and Phillips, probably the leaders of the conspiracy, are reversed, while the other four conspirators — the underlings — remain in prison. This can be explained only by the compromise embodied in our law governing standing to invoke the exclusionary rule. *See* Comment, 115 U.Pa.L.Rev. at 1141. *But see Broeder, Wong Sun v. United States:* A Study in Faith and Hope, 42 Neb.L.Rev. 483, 539-45 (1963); Comment, Judicial Control of Illegal Search and Seizure, 58 Yale L.J. 144, 154-58 (1948). That law balances the need to deter unlawful police conduct against the equally important need to imprison criminals. The result of this balancing is that the exclusionary rule may be asserted by only a portion of those against whom unlawfully seized evidence is sought to be used. The defendants with standing are those whose rights have been most egregiously violated: those whose legitimate expectations of privacy have been invaded by the State. *See United States v. Calandra*, 1974, 414 U.S. 338, 348, 94 S.Ct. 613, 38 L.Ed.2d 561. Hence, we reverse the convictions of Houltin and Phillips and affirm those of Burke, Morrison, Francis, and Croucher.

Affirmed in part, reversed in part.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1975

No. 74-4144

D. C. Docket No. CR-74-393-EP

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

MARTIN W. HOULTIN, ROBERT BURKE, DUANE MORRISON, MICHAEL FRANCIS, KENNETH B. PHILLIPS, and KENNETH J. CROUCHER,
Defendants-Appellants.

Appeal from the United States District Court for the Western District of Texas

Before JONES, WISDOM and AINSWORTH, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed as to Robert Burke, Duane Morrison, Michael Francis, and Kenneth J. Croucher, and reversed as to Martin W. Houltin and Kenneth B. Phillips in accordance with the opinion of this Court.

January 12, 1976

Issued as Mandate: June 9, 1976.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK

Edward W. Wadsworth
Clerk

June 1, 1976

TO ALL COUNSEL OF RECORD

No. 74-4144 - USA v. Martin W. Houltin, Robert Burke, Duane Morrison, Michael Francis, Kenneth B. Phillips, and Kenneth J. Croucher

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be

polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,
EDWARD W. WADSWORTH,
Clerk
/s/ SUSAN M. GRAVOIS
Deputy Clerk

/smg

cc: Mr. Lee A. Chagra
Mr. Malcolm McGregor
Mr. Bill Raykind
Mr. Jeremiah Handy

No. 75-1884

Supreme Court, U. S.
FILED
DEC 2 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

KENNETH J. CROUCHER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1884

KENNETH J. CROUCHER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioners contend, *inter alia,* that their prosecution by the federal government for conspiracy to import and possess marijuana after they had been convicted by the State of New Mexico of possession of the same marijuana violated the Double Jeopardy Clause of the Fifth Amendment and was contrary to Department of Justice policy.

After a jury trial in the United States District Court for the Western District of Texas, petitioners were convicted of conspiracy to import approximately 2,260 pounds of marijuana, in violation of 21 U.S.C. 963 (count one), and of conspiracy to possess the same quantity of marijuana with intent to distribute it, in violation of 21 U.S.C. 846 (count two). Petitioners were sentenced to consecutive terms of five years' imprisonment on each count and to a five-year term of special parole. In addition, petitioners Kenneth Croucher and Michael

Francis were fined $5,000 and petitioners Robert Burke and Duane Morrison were fined $10,000. The court of appeals affirmed (525 F. 2d 943; Pet. App. 1a-18a) and, on June 1, 1976, denied a petition for rehearing with suggestion of rehearing *en banc* (Pet. App. 20a-21a).[1]

The evidence at trial showed that petitioners participated in the clandestine importation of more than a ton of marijuana from Mexico into this country on October 12 and 13, 1973. Agents of the Drug Enforcement Administration and the United States Customs Service tracked three private aircraft from Columbus, New Mexico, across the border into Mexico on the afternoon of October 12. Airborne surveillance teams observed the three airplanes land in a dry lakebed in Mexico, meet a large van, and then return to New Mexico approximately twenty minutes later (Tr. 87-92). When the airplanes arrived near Magdalena, New Mexico, at 9:30 p.m., one of the pilots radioed "ground support" to "turn on your flashers." The agents then saw a set of automobile emergency flashers blink on and off for a few seconds (Tr. 93-96). Shortly thereafter, the automobile drove to another location and turned on its lights. The three airplanes then landed beside the automobile and took off again a few minutes later (Tr. 98-99, 105).

New Mexico State Police subsequently arrested petitioner Croucher at the spot where the aircraft had landed and found 2,260 pounds of marijuana in brick form stacked nearby. After receiving *Miranda* warnings, petitioner Croucher told the arresting officers that he had

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[1]The court reversed the convictions of co-defendants Martin Houltin and Kenneth Phillips after finding that evidence against them had been obtained through the exploitation of illegal wire interceptions (Pet. App. 6a-14a).

been left to guard the marijuana and was being paid $1,000 for his role in the smuggling operation (Tr. 253-254). Petitioners Burke, Morrison and Francis were arrested along with co-defendant Houltin at the Columbus airport as they alighted from the airplanes. The arresting agents searched the planes and found marijuana debris in each of them (Tr. 319-323).[2]

Prior to their federal convictions, petitioners pleaded *nolo contendere* in a New Mexico state court to the charge, growing out of these events, of possession of more than eight ounces of marijuana, in violation of N.M. Stat. Ann. 54-11-23B(3) (1975 Pocket Supp.). Each was sentenced to 18 months' probation.

1. Petitioners contend (Pet. 16-18) that the Double Jeopardy Clause of the Fifth Amendment precluded their federal prosecution after they had been convicted by the State of New Mexico for their roles in the same illegal drug transaction. This Court has expressly held, however, that a federal prosecution following a state prosecution for the same conduct is not barred by the Fifth Amendment. *Abbate* v. *United States*, 359 U.S. 187; *United States* v. *Lanza*, 260 U.S. 377; see also *Bartkus* v. *Illinois*, 359 U.S. 121.

2. a. Shortly after the rulings in *Bartkus* and *Abbate*, the Department of Justice adopted a formal policy of declining to prosecute individuals for acts forming the basis of a state conviction unless there exist "most compelling reasons," and then only after the specific approval of the Attorney General or an Assistant Attorney General has been obtained. See *Petite* v. *United States*, 361

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[2]Co-defendant Phillips, who had apparently been manning the "ground support" automobile, was arrested at a roadblock near the site where the marijuana had been found (Tr. 299-301).

U.S. 529, 531; *Watts* v. *United States*, 422 U.S. 1032 (vacated and remanded to permit the government to move to dismiss); *Ackerson* v. *United States*, 419 U.S. 1099 (same). Petitioners have alleged, and our review has confirmed, that no such approval was sought or obtained in this case.

In our view, the failure of the United States Attorney to obtain authorization from the Department of Justice before prosecuting a charge that is subject to the Department's "dual prosecution" policy, while contrary to internal Department procedures, confers no right enforceable by the defendant to obtain dismissal of the charges. What is involved in such situations, rather, is a matter of the exercise of prosecutorial discretion (and, where a prosecution has been commenced without appropriate authorization and retroactive authorization is not issued, of judicial grace in cooperating with the executive branch in the implementation of Departmental policy). Thus, petitioners have no legal entitlement to relief on this ground. *Sullivan* v. *United States*, 348 U.S. 170.

b. After reviewing the facts of this case, we have concluded that the offense of conspiracy to import marijuana into this country does involve a compelling federal interest that is distinct from any interest vindicated by petitioners' prior state convictions on the charge of simple possession of the drug. Accordingly, petitioners' federal prosecution for conspiracy to import marijuana has been approved by the Attorney General pursuant to Departmental guidelines and there is thus no basis for disturbing their convictions on the importation count.

We believe, however, that petitioners' prosecution for conspiracy to possess marijuana was not supported by an independent compelling federal interest in light of the substantial similarity between that charge and the offense of which petitioners were convicted in state

court. We therefore respectfully request the Court to permit the effectuation of this governmental policy by granting the petition, vacating the judgment of the court of appeals only as to the charge of conspiracy to possess marijuana (count two), and remanding the case to the district court with instructions to grant the government's motion to dismiss that count.[3] In all other respects the petition should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1976.

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[3] In view of the relief we have requested, it is unnecessary for the Court to consider petitioners' additional contention that they could not be convicted or given cumulative punishment on separate counts of conspiracy to import and conspiracy to possess marijuana, in violation of 21 U.S.C. 963 and 846.